

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CLEO R. HERRICK</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>AUTO RECYCLERS OF KANSAS</b>	)	
Respondent	)	Docket No. 1,025,522
	)	
AND	)	
	)	
<b>FIRSTCOMP INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the February 15, 2007, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on May 23, 2007. Chris A. Clements, of Wichita, Kansas, appeared for the claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident on January 12, 2006, and that the injury arose out of and in the course of his employment with respondent. The ALJ also found that claimant complied with the notice requirement and made a timely written claim. The ALJ found that claimant suffered a 10 percent impairment to the right upper extremity and awarded permanent partial disability compensation based on a 210 week schedule, which is to the arm.<sup>1</sup>

The Board has considered the record and adopted the stipulations listed in the Award.

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<sup>1</sup> K.S.A. 44-510d(a)(13).

### ISSUES

Claimant contends that the ALJ's award of only a 10 percent permanent partial impairment of his right upper extremity at the 210 week level is in error. Claimant argues that his impairment includes the shoulder and, therefore, should be compensated at the 225 week level. Claimant also argues that there is no compelling reason to adopt the testimony of one doctor over the other and requests that the Board split the ratings of Drs. Pedro Murati and Pat Do and award him a 12 percent permanent partial disability to the right upper extremity.

Respondent has not filed a brief in this appeal, but during oral argument to the Board acknowledged that claimant's injury and resulting disability was to the shoulder. Respondent contends the ALJ's Award should otherwise be affirmed.

Accordingly, the percentage of claimant's functional impairment is the sole issue for the Board's review.

### FINDINGS OF FACT

Claimant began working for respondent in November or December, 2004. In January 2005, he and a coworker were putting transmissions on a shelf. Claimant was on a ladder and the coworker was underneath, pushing on the transmission. Claimant's coworker slipped, and the transmission dropped. Claimant did not let go of the transmission because he did not want it to fall on his coworker. That same day, claimant told Barney Wells, respondent's manager, and Emad, respondent's owner, that when the transmission was dropped, his arm jerked and was hurting. He told them he thought he pulled a muscle. Emad told claimant to wait awhile before seeking medical attention.

Between January and August 2005, claimant worked his regular job at full duty, and his right shoulder condition continued to get worse. Claimant continued to complain of pain and again talked to Emad about his problems. Finally, claimant got tired of waiting and, in August 2005, on his own, he went to see Dr. St. Clair in Haysville.

Dr. St. Clair took x-rays and scheduled claimant for an MRI. The MRI was done on September 13, 2005, after which Dr. St. Clair referred claimant to Dr. Pat Do. Dr. Do gave claimant injections in his shoulder and put him in physical therapy. On November 7, 2005, Dr. Do performed surgery on claimant's right shoulder. Claimant had more physical therapy after the surgery. Dr. Do released claimant with restrictions on January 12, 2006. Claimant did not return to work for respondent after his release because he said he had received threats from Emad while he was off work. He has not gone back to work for any employer and now works out of his home.

Since his surgery and release from treatment, claimant said he no longer has the sharp pain he had but still has discomfort. In fact, on July 11, 2006, he returned to Dr. Do

and was again sent back to physical therapy. Claimant has obtained relief from the sharp pain he had before his surgery, but still has pain. He has good movement of his shoulder but has trouble when he tries to go to sleep. At night, his arm swells up and he feels a burning and aching.

Dr. Pat Do, a board certified orthopedic surgeon, first saw claimant on September 23, 2005. Claimant complained of right shoulder pain. After examining claimant and reviewing an MRI scan, Dr. Do diagnosed claimant with rotator cuff syndrome and possible rotator cuff tear. He provided claimant with conservative care and physical therapy. Ultimately, he performed a subacromial decompression and debridement of claimant's right shoulder. Dr. Do believed that claimant had some improvement of his pain after the surgery. He found claimant was at maximum medical improvement (MMI) on January 12, 2006. At that time Dr. Do believed that claimant was doing reasonably well and had reasonable range of motion in his shoulder.

Dr. Do saw claimant again on July 11, 2006. Claimant was complaining of having pain with weather changes. Dr. Do told him it sometimes takes a year or two to recover. He also ordered four more physical therapy sessions. Claimant returned on August 15, 2006, and Dr. Do ordered another MRI. That MRI revealed claimant had no rotator cuff tear and no impingement, but only had tendinitis. The last time Dr. Do saw claimant was on October 5, 2006. Claimant was still complaining of pain, and Dr. Do did an impingement test, which was negative. He again found claimant to be at MMI and said there was no significant change between claimant's condition on October 5, 2006, and January 12, 2006.

Dr. Do rated claimant after the January 12, 2006, visit and found that claimant had a permanent partial impairment of 7 percent to the upper extremity, based on the *AMA Guides*.<sup>2</sup> This rating consisted of 5 percent for the rotator cuff syndrome and tear, which resulted in the subacromial decompression and debridement surgery, plus an additional 2 percent for loss of range of motion. He found no change in claimant's impairment on October 5, 2006. He did not think claimant would need future medical treatment. Dr. Do opined that claimant's accident was causally related to his accident at work.

Dr. Pedro Murati, who is a board certified independent medical examiner, evaluated claimant on February 15, 2006, at the request of claimant's attorney. Claimant reported to Dr. Murati the facts of the accident and his treatment. Claimant complained of pain in his right shoulder, although not as severe as before the surgery. He also complained that his right shoulder is painful when he raises his right arm and when the weather is cold. He said his right shoulder felt swollen. He also reported that he experienced a burning sensation in his right shoulder, as well as a sensation of pins and needles at night.

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant also said he felt sharp shooting pains in his right arm when pushing or pulling with his right shoulder.

Upon examination, Dr. Murati found that claimant had a positive rotator cuff exam and a positive O'Brien's exam on the right. There was positive impingement on the right. Using a goniometer, Dr. Murati found that claimant's right shoulder revealed 155 degrees of flexion and 145 degrees abduction. There was a negative Speeds test on the right. Dr. Murati found severe AC crepitus of the right shoulder. Dr. Murati diagnosed claimant with right rotator cuff strain vs. tear, right shoulder impingement syndrome, and status post right shoulder arthroscopy with debridement and subacromial decompression. He opined that his diagnoses are a direct result of claimant's work-related accident of January 2005. Dr. Murati also opined that claimant continued to aggravate his injury as he continued to work.

Dr. Murati rated claimant as having an 8 percent right upper extremity impairment for his AC crepitus of the right shoulder and a 10 percent impairment of the right upper extremity for claimant's post subacromial decompression. Using the Combined Values Chart, this converted to a 17 percent right upper extremity impairment.

#### **PRINCIPLES OF LAW**

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . . .

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

### **ANALYSIS**

Dr. Do and Dr. Murati agreed that the *AMA Guides* do not specifically address the surgical procedure performed on claimant. Dr. Do was claimant's treating physician. He performed the surgery on claimant's right shoulder and followed the course of claimant's recovery. He did not find crepitus. His rating of 7 percent to the upper extremity is credible.

Dr. Murati saw claimant on only one occasion. He is a well-qualified and experienced independent medical examiner with a particular interest in disability evaluations. He has an expertise in the use of the *AMA Guides*. His rating of 10 percent to the upper extremity for the right shoulder rotator cuff syndrome and tear diagnoses and surgery is credible. However, his additional 8 percent impairment rating for AC joint crepitus is not persuasive given the absence of such a finding by the treating physician.

### **CONCLUSION**

Claimant has a 10 percent impairment of function. This impairment is to the shoulder. Therefore, claimant's permanent partial disability should be compensated at the 225 week level.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 15, 2007, is modified as follows:

Claimant is entitled to 16.11 weeks of temporary total disability compensation at the rate of \$219.54 per week in the amount of \$3,536.79, followed by 20.89 weeks of permanent partial disability compensation, at the rate of \$219.54 per week, in the amount of \$4,586.19 for a 10 percent loss of use of the shoulder, making a total award of

\$8,122.98, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Although the ALJ has approved a fee agreement in this matter, the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge